



Decision and Reasons for Decision

Application Number: 310320

Applicant: Middleton

Respondent: Brisbane City Council

Decision Date: 6 September 2011

Catchwords: **ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT DOCUMENTS – applicant sought access to documents in relation to a residential sewage issue – agency located and released documents to the applicant – applicant contends that further documents responding to her access application exist – whether there are reasonable grounds for agency to be satisfied documents do not exist – whether agency has taken all reasonable steps to locate documents – whether access can be refused under sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld)**

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REASONS FOR DECISION

Summary

1. The applicant applied to Brisbane City Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various documents relating to sewage flooding issues on her property.
2. In response to the access application, Council located and provided the applicant with full access to 660 pages.
3. In her external review application, the applicant questioned the sufficiency of Council's searches, contending that Council holds more documents relevant to her access application.
4. In response¹ to the Office of the Information Commissioner's (**OIC**) preliminary view² the categories of documents which the applicant contends have not been located by Council were narrowed to the following:

Category	Particulars
Category 1	Job Sheet or similar document for a sewage overflow incident reported on 16 February 2010 (Council reference CC28035553).
Category 2	Job Sheet or similar document for a dry weather sewage overflow incident reported on 24 April 2010 (Council reference SCC50 28396204).
Category 3	All documentation on file for her property that has not already been provided. This will include but is not limited to correspondence to and from third parties, including complaints from neighbours or local residents, State departments, the Office of the Queensland Ombudsman, Councillors, Queensland Local Government Mutual Liability Pool, Queensland Building Services Authority, Queensland Urban Utilities etc.
Category 4	A copy of the Current and Historical Listing Form noting the sewage overflow incidents reported by the applicant on 16 February 2010 and 24 April 2010.
Category 5	A copy of a written response that was provided to Councillor Sutton.
Category 6	Copies of all documents that Councillor Sutton has on file in relation to her property, which includes but is not limited to correspondence to and from the Federal Member for Griffith since 20 March 2010.

5. During the course of the external review, Council conducted further searches for documents responding to Categories 1 to 6 and provided submissions to the OIC in relation to those searches.
6. For the reasons set out below, I am satisfied that Council may refuse access to Category 1 to 6 documents under section 47(3)(e) of the RTI Act as there are reasonable grounds to be satisfied that the documents sought do not exist.³

¹ 25 February 2011.

² 22 February 2011.

³ Under section 52(1)(a) of the RTI Act.

Background

7. Significant procedural steps relating to the application and external review are set out in Appendix A.

Reviewable decision

8. The decision under review is Council's decision dated 22 July 2010.

Issues in this review

9. The remaining issue to be addressed on external review is whether Council is entitled to refuse access⁴ to the documents sought at paragraph 4 above, on the basis that they are nonexistent.⁵

Evidence considered

10. Evidence, submissions, legislation and other material I have considered in reaching my decision is as disclosed in these reasons (including footnotes and appendices).

Relevant law

11. Under the RTI Act, a person has a right to be given access to documents of an agency,⁶ though this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.⁷ The RTI Act provides that access to a document may be refused⁸ if the document is nonexistent or unlocatable.⁹

Nonexistent document

12. However, if an agency relies on searches to justify a decision that the document sought does not exist, all reasonable steps must be taken to locate the requested document.¹⁰

Findings

13. The applicant contends that Council should hold, but has not located, all documents described in Categories 1 to 6.

Are there reasonable grounds to be satisfied that the documents in issue do not exist?

14. The answer to this question is 'yes' in respect of each of the six categories of documents sought, for the reasons that follow.
15. A document is nonexistent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.¹¹

⁴ Under section 47(3)(e) of the RTI Act.

⁵ Under section 52(1)(a) of the RTI Act.

⁶ Section 23 of the RTI Act.

⁷ As set out in section 47 of the RTI Act.

⁸ Section 47(3)(e) of the RTI Act.

⁹ Sections 47(3)(e) and 52 of the RTI Act at Appendix B.

¹⁰ See *PDE and the University of Queensland (PDE)* (Unreported, Queensland Information Commissioner, 9 February 2009).

¹¹ Section 52(1)(a) of the RTI Act.

16. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. However, in *PDE and the University of Queensland (PDE)*¹² the Information Commissioner explained that to be satisfied that a document does not exist, the agency must rely on its particular knowledge and experience, having regard to various key factors including:
- administrative arrangements of government
 - structure of the agency
 - functions and responsibilities of the agency (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - practices and procedures of the agency (including but not limited to its information management approach)
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s; and
 - the nature of the government activity the request relates to.
17. When these key factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for searches to be conducted.
18. However, if the agency relies on searches to justify a decision that the document sought does not exist, all reasonable steps must be taken to locate the requested document.¹³
19. I consider each category of document sought in turn below.

Category 1 and 2 Documents

20. The applicant contends¹⁴ that further Category 1 and 2 documents exist as Council officers who attended each sewage overflow incident at the applicant's address informed her that a report of each visit to her property would be completed as a procedural requirement.
21. The applicant states:¹⁵
- Whilst I have received the Job Cards for the above¹⁶ and limited CCTV inspection results, there were no reports completed by Queensland Urban Utilities.*
22. The applicant later states¹⁷ that she has not received Job Cards for sewage overflow incidents reported on 16 February 2010 and 24 April 2010 (**2010 incidents**).
23. Council explained¹⁸ that following each visit to the applicant's property, information was recorded in Job Card Work Order BW247810¹⁹ (**Job Card**) which is the 'report' Council officers referred to. In any event, Council asked Queensland Urban Utilities²⁰ (**QUU**),

¹² Although *PDE* concerned section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52(1) of the RTI Act and therefore, the reasoning in *PDE* can be applied in the context of the RTI Act. See also *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) made under the RTI Act.

¹³ See *PDE*.

¹⁴ In her submissions to OIC dated 14 August 2010.

¹⁵ In her submissions to OIC dated 14 August 2010.

¹⁶ Referring to sewage overflow incidents on 16 February 2010 and 24 April 2010.

¹⁷ In her submissions to OIC dated 25 February 2011.

¹⁸ In its submissions to OIC dated 19 January 2011.

¹⁹ Contained in Council's 'Network Sewerage City Drains Resp Main; Responsive Mtcc' system.

²⁰ As a separate agency to Council since 1 July 2010 and formerly known as Brisbane Water.

to undertake another search for any additional documents relating to the 2010 incidents that had not already been provided to the applicant. Council submits that no further documents were located.

24. With specific reference to the Category 1 document, Council submits²¹ that:
- the applicant telephoned Council's Call Centre on 16 February 2010 to report a sewage overflow incident
 - during that conversation Council informed the applicant of the appropriate Council fee for Council staff to attend her property; and
 - the applicant declined to have Council staff visit her property to inspect this overflow incident.
25. Council referred OIC to its usual practices and procedures²² and submits that when a matter is resolved upon contact with Council's Call Centre and no follow up action is required, the matter is closed in the Call Centre system. In this instance, Council staff did not visit the applicant's property in response to the overflow incident reported on 16 February 2010 and therefore no Job Card record was created.
26. On that basis, Council submits that the only document in existence relating to the overflow incident reported on 16 February 2010 is the Call Centre report. A copy of the Call Centre report was released to the applicant with Council's decision and a further copy was provided by Council to the applicant on 9 June 2011.
27. In relation to the Category 2 document, Council submits that a copy of the Job Card completed by Council staff following their attendance at the applicant's property to inspect a sewage overflow incident reported on 24 April 2010 was released to the applicant with its decision. A further copy of the Category 2 document was provided to the applicant by Council on 9 June 2011.
28. I have carefully considered Council's submissions and I am satisfied that Council has taken all reasonable steps to locate the documents sought in Categories 1 and 2 and that there are reasonable grounds to be satisfied that:
- the Category 1 Job Card does not exist because it was never created,²³ and
 - no further Category 1 or 2 documents exist and therefore Council may refuse access to the documents sought.²⁴

Category 3 Documents

29. The applicant contends that Council has not provided her with a range of documents;²⁵ however the applicant has not provided any evidence to OIC to support the existence of additional Category 3 documents.²⁶
30. Specifically, the applicant claims a covering letter to Council providing a Plumbing and Drainage report (**Report**) dated 23 September 2009 should exist as well as further Category 3 documents from Council to the Queensland Local Government Mutual Liability Pool.

²¹ In its submissions provided to OIC staff by telephone on 16 June 2011.

²² See *PDE*.

²³ Section 47(3)(e) and section 52(1)(a) of the RTI Act.

²⁴ Section 47(3)(e) and sections 52(1)(a) of the RTI Act.

²⁵ Including documents provided from the Department of Infrastructure and Planning, Queensland Building Services Authority and the Office of the Queensland Ombudsman.

²⁶ OIC has viewed a copy of the 660 pages released to the applicant in this matter. It is not apparent on the face of these documents that further Category 3 documents should exist.

31. Council submits that it holds no further Category 3 documents relevant to the access application. In support of its submission, Council has conducted a range of searches on a number of occasions including:
- searches of the TRIM records management system using a range of key words
 - searches of CMX being Council's correspondence management tracking system
 - an inspection of file 185/420/522/43 which is a sewerage investigation file for the applicant's address; and
 - enquiries with relevant QUU officers.
32. In relation to a covering letter to the Report, the Manager Plumbing Services Group, QUU informed Council that he was unaware of any covering letter accompanying the Report which was prepared by BT Plumbing Service and addressed to the Queensland Building Services Authority.²⁷
33. As to the applicant's contention that Council has not located all documents sent or received by Queensland Local Government Mutual Liability Pool, Council submits²⁸ that, in accordance with its usual practices and procedures,²⁹ once insurance matters are referred to Council's insurers or loss assessors, the matters are dealt with by them, with minimal documents being exchanged with Council, except where circumstances necessitate contact with Council.
34. Council submits that, following the extensive searches detailed at paragraph 31 above, the documents sought by the applicant were not located nor were any further documents relevant to the access application.
35. Council also submits that it has conducted numerous searches for documents relating to sewage overflow incidents at the applicant's property across a number of access applications under the now repealed *Freedom of Information Act 1982* (Qld) and RTI Act and that no further documents exist to those already provided to the applicant.
36. In light of the repeated and detailed searches conducted by Council in this matter and previous applications, I find that there are reasonable grounds to be satisfied that no further Category 3 documents exist.

Category 4 Documents

37. The applicant is seeking evidence that the sewage overflow incidents she reported on 16 February 2010 and 24 April 2010 are listed on Council's Current and Historical Listing Form.
38. Council submits that a search for the 'Current and Historical Listing' of the 2010 incidents reported by the applicant could not be undertaken when processing the access application or during conduct of the external review as the 'wet weather event flag was not activated'.³⁰
39. Council provided the applicant with a copy of the script which refers to Council's Contact Centre being notified by QUU that 'the wet weather surcharge has been activated' in the Current and Historical Listing Form. This in turn makes the Current

²⁷ In Council's submission 29 October 2010.

²⁸ In its submissions dated 14 February 2011.

²⁹ See *PDE*.

³⁰ Council's submissions dated 22 June 2010.

and Historical Listing Form available to Council staff to search and/or enter reports of sewage overflow incidents.

40. Council explained that the wet weather surcharge is only activated during a 'heavy rain event'. Then, if people to call and inquire if their property has been affected by heavy rain events in the past, the system can be searched and relevant incidents recorded.
41. Council further explained that if someone makes the same inquiry during 'dry weather', the Current and Historical Listing system cannot be searched or incidents recorded.
42. The applicant's access application refers to the sewage overflow incident on 24 April 2010 as a 'dry weather event' and Council has confirmed³¹ that the wet weather flag was not activated on 16 February 2010.
43. Council therefore submits that the Job Card and Call Centre record (category 1 and 2 documents) released to the applicant are Council's record of the 2010 incidents reported by the applicant.
44. On the basis of the above, I am satisfied that the 2010 incidents were not recorded in the Current and Historical Listing system as the system was not accessible for such records to be created.
45. Therefore, I am satisfied that Council may refuse access to Category 4 documents under sections 47(3)(e) and 52(1)(a) of the RTI Act as there are reasonable grounds to be satisfied that documents sought in Category 4 do not exist.

Category 5 Documents

46. The applicant contends that the Category 5 document must exist, pointing to an email³² from Councillor Sutton indicating QUU had advised her arrangements would be made to investigate the sewage issues at the applicant's property and that she (Councillor Sutton) would receive a '*written response in due course*'.
47. The applicant made an identical request for the Category 5 document in another external review.³³ OIC issued its decision on 13 May 2011 which detailed OIC's finding that there were reasonable grounds to be satisfied that the Category 5³⁴ document does not exist because it was not created.
48. The applicant claims, in her external review application,³⁵ that '*my Federal Member has also written asking for same*'. The applicant's reference to additional documents from her Federal Member is outside the scope of her access application as she has specifically requested a copy of the written response that she believes was provided to Councillor Sutton from QUU.
49. As the request for the Category 5 document has been sufficiently addressed in an earlier OIC decision, and the applicant has been unable to provide any further evidence to support her contention, I am satisfied that it is unnecessary to address the applicant's request for the Category 5 document in any further detail.

³¹ In its discussions with OIC staff on 27 June 2011.

³² Dated 17 February 2010.

³³ OIC reference 310347; see www.oic.qld.gov.au for a copy of the decision of *Middleton and Queensland Urban Utilities* (Unreported, Queensland Information Commissioner, 13 May 2011).

³⁴ The relevant request was referred to as the Category B document in OIC's decision of 13 May 2011 (OIC reference 310347).

³⁵ Dated 27 July 2010.

Category 6 Documents

50. The applicant contends that further Category 6 documents must be within the possession of Councillor Sutton's Morningside Ward Office (**Morningside Ward Office**). On external review, the applicant specifically sought:
- a) a file note relating to the applicant's telephone call to the Morningside Ward Office on 6 February 2008; and
 - b) correspondence from the Morningside Ward Office acknowledging the documents received from the Federal Member for Griffith.
51. The applicant further contends that OIC staff would need to visit the Morningside Ward Office to be satisfied that all documents requested have been located. I do not accept the applicant's contention.
52. OIC staff contacted the Morningside Ward Office for information on its records management processes.³⁶ The Morningside Ward Office Manager explained that:
- the offices' central electronic records management system is 'ACT'
 - staff record contact with any person in ACT
 - staff scan all correspondence and hardcopy records into ACT and attach it to the individual's file
 - ACT is searched by an individual's name
 - the applicant has records dating back to 2004 stored in ACT
 - the office also uses 'Electrac' which is an Australian Labor Party (**ALP**) program which Councillors representing the ALP are entitled to load onto Council computers and is predominantly used for mail-merge projects
 - staff can also attach notes to a record in Electrac
 - Electrac is also searched by name and there is no history of the applicant in Electrac
 - staff had physically inspected hard copy files; and
 - it is the usual practice of the Morningside Ward Office not to acknowledge correspondence unless a specific request for confirmation of receipt is made.
53. In relation to item a) above, I also refer to OIC's decision in *Middleton and Brisbane City Council*,³⁷ where the applicant requested a file note of a telephone call to the Morningside Ward Office of 7 February 2008 rather than 6 February 2008.³⁸
54. With regard to item b) above, OIC has reviewed the documents provided to the Morningside Ward Office by the Federal Member for Griffith.³⁹ OIC has considered the relevant documents and there is nothing in the Federal Member's correspondence to the Morningside Ward Office to indicate that it should respond to or acknowledge the documents received from the Federal Member for Griffith. In accordance with the usual practices of the Morningside Ward Office,⁴⁰ I accept its submission that no

³⁶ On 27 June 2011, OIC also received a signed Search Certification and Record of Searches from the Morningside Ward Office.

³⁷ OIC reference 310175; see www.oic.qld.gov.au for a copy of the decision of *Middleton and Brisbane City Council*, (Unreported, Queensland Information Commissioner, 13 May 2011).

³⁸ In case there was some confusion with the dates provided by the applicant, OIC noted that the applicant had received a copy of her letter of 7 November 2009 to Councillor Sutton which includes a hand-written record of telephone calls between the applicant and Councillor Sutton's office on 6 January 2010 and 7 January 2010. This information was provided to the applicant in a preliminary view, however the applicant did not clarify the date of the file note she was seeking.

³⁹ The applicant has sent correspondence to the Federal Member for Griffith, which it responded to and then forwarded copies to the Morningside Ward Office.

⁴⁰ See *PDE*.

correspondence was created in response to documents received from the Federal Member for Griffith.

55. The Morningside Ward Office has repeatedly searched for the requested documents. Both electronic and hard copy records as detailed at paragraph 52 above, have been interrogated on a number of occasions. In the circumstances I am satisfied that Council has taken all reasonable steps to locate Category 6 documents and there are reasonable grounds to be satisfied that no further Category 6 documents exist.⁴¹

Conclusion

56. For the reasons set out above, I find that there are reasonable grounds to be satisfied that no further Category 1 to 6 documents exist in accordance with section 52(1)(a) and access can therefore be refused under section 47(3)(e) of the RTI Act.

DECISION

57. I affirm Council's decision to refuse access to the requested documents under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that no further Category 1 to 6 documents exist.
58. I have made this decision as a delegate of the Information Commissioner under section 145 of the RTI Act.

Jenny Mead
Right to Information Commissioner

Date: 6 September 2011

⁴¹ Section 47(3)(e) and section 52(1)(a) of the RTI Act.

APPENDIX A**Significant procedural steps**

Date⁴²	Event
14 May 2010	The applicant applied to Council under the RTI Act for a range of documents which broadly relate to sewerage overflow issues at her residence.
22 July 2010	Council located and released 660 documents to the applicant.
27 July 2010	The applicant applied to OIC for external review of Council's RTI Decision of 22 July 2010 claiming that Council had not located all documents relevant to her access application.
12 August 2010	OIC informed Council and the applicant that the external review application had been accepted for review.
14 August 2010	OIC received submissions from the applicant.
6 September 2010	OIC received further submissions from the applicant.
29 October 2010	Council provided OIC with submissions and further information on the searches performed for documents relevant to the access application.
6 November 2010	The applicant provided further submissions to OIC.
19 January 2011	Council provided OIC with submissions and further information on the searches performed for documents relevant to the access application.
14 February 2011	Council provided further submissions to OIC.
22 February 2011	OIC conveyed a written preliminary view to the applicant that Council had taken all reasonable steps to locate the documents in issue and that there were reasonable grounds to be satisfied that no further documents exist in relation to the application. OIC invited the applicant to provide submissions in support of her case if she did not accept the preliminary view.
25 February 2011	OIC received submissions from the applicant.
25 May 2011	OIC requested further information from Council.
22 June 2011	Council provided further submissions to OIC.
27 June 2011	OIC received further submissions from Council.
13 July 2011	OIC obtained submissions from the Morningside Ward Office on its usual administrative procedures and searches performed.

⁴² Of correspondence or relevant communication unless otherwise indicated.

APPENDIX B

Relevant provisions of the RTI Act

Section 47 of the RTI Act provides:

47 Grounds on which access may be refused

- (1) *This section sets out grounds on which access may be refused.*
- (2) *It is the Parliament's intention that –*
 - (a) *the grounds are to be interpreted narrowly; and*
 - (b) *an agency or Minister may give access to a document even if a ground on which access may be refused applies.*
- (3) *On an application, an agency may refuse access to a document of the agency and a Minister may refuse access to a document of the Minister –*
 - ...
 - (e) *because the document is nonexistent or unlocatable as mentioned in section 52; or*
 - ...

Section 52 of the RTI Act provides:

52 Document nonexistent or unlocatable

- (1) *For section 47(3)(e), a document is nonexistent or unlocatable if—*
 - (a) *the agency or Minister dealing with the application for access is satisfied the document does not exist; or*

Example—

a document that has not been created

....